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In The
Supreme Court of the United States
October Term, 1988

EUGENE DIAMOND, M.D.,
Petitioner,

v.

ALLAN G. CHARLES, M.D., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether intervening defendants appropriately were held liable, under 42 U.S.C. § 1988, for the attorney's fees the prevailing plaintiffs incurred as a direct and immediate consequence of intervening defendants' litigation conduct?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

EUGENE DIAMOND, M. D.,

Petitioner,

v.

ALLAN G. CHARLES, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Parties To The Proceedings
(See Petition for Certiorari)

OPINIONS BELOW
(See Petition for Certiorari)

JURISDICTION
(See Petition for Certiorari)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(See Petition for Certiorari)

STATEMENT OF THE CASE

Twelve years after the enactment of the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988 (hereafter "§ 1988"), the standards governing its application are well established. Congress intended § 1988 to ensure "'effective access to the judicial process for persons with civil rights grievances.'" Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). Thus, a civil rights plaintiff who prevails ordinarily recovers attorney's fees unless "'special circumstances would render such an award unjust.'" Hensley, 461 U.S. at 429 (quoting S. Rep. No. 94-1011, p. 4 (1976)). Section 1988 commits to the district court's discretion the determination of when a prevailing party receives an award of fees. Hensley, 461 U.S. at 433.

In the case at bar, the United States Court of Appeals for the Seventh Circuit held that the district court had appropriately exercised its discretion and awarded fees to plaintiffs who prevailed by having "the great bulk of Illinois' lengthy and complex omnibus abortion law . . . declared unconstitutional." Charles v. Daley and Diamond, 846 F.2d 1057, 1064 (7th Cir. 1988) (hereafter "Charles III"); App. at 13a. The Seventh Circuit also ruled that the district court properly had assessed a portion of the fees against intervening defendants who had "engaged the plaintiffs in a protracted court battle to the extent that even the governmental defendant, the State of Illinois, was unprepared to go." Charles III, 846 F.2d at 1065 n.11; App. at 15a n.11.

The decision below, affirming reasonable fee awards to the prevailing plaintiffs, satisfies the purpose of the Civil Rights Attorney's Fee Award Act and is consistent with prior decisions of this Court applying § 1988. Intervening defendants raise no substantial issues deserving of review as to either the scope of § 1988 or its proper application to the defendants in this litigation.

A. Intervening Defendants Voluntarily Interjected Themselves Into This Litigation And Led the Defense Efforts.

Plaintiffs, a class of Illinois initiated this constitutional challenge to the amended Illinois Abortion Law. Had the law gone into effect, plaintiff-physicians would have risked criminal prosecution for offering certain family planning services and for performing

pregnancy terminations. Accordingly, plaintiffs claimed that the challenged statute abridged the fundamental rights of the physicians and of the women plaintiffs. See Complaint, pars. 15, 19, 20, 28.

Plaintiffs named as defendants the Illinois law enforcement officials charged with implementing and enforcing this criminal law: the Illinois Attorney General, the Director of the Illinois Department of Public Health, and the State's Attorney of Cook County, who was sued in his official capacity and as the representative of the defendant class of all Illinois State's Attorneys.

Almost immediately after plaintiffs filed suit, Eugene Diamond, M.D., Jasper Williams, M.D., and David Campbell moved to intervene and to join the government

as defendants. The proposed intervening defendants asserted a variety of personal and pecuniary interests they claimed would be advanced, not violated, by enforcement of the Abortion Law. In contrast to plaintiffs, intervening defendants did not claim that their constitutional rights were threatened by the amended law. Nor did they claim that their rights were at risk as a result of plaintiffs' suit or that any associational interests would be abridged if they were not allowed to intervene as defendants.

Plaintiffs strenuously opposed the addition of intervening defendants as parties to the lawsuit, contending that intervenors lacked any legally cognizable interest in the statute or in its enforcement. Plaintiffs urged

participation for proposed intervenors as amicus curiae, which would have allowed them access to the court and an opportunity to articulate their agreement with the terms of the statute. Notwithstanding plaintiffs' objections, the district court granted the motion to intervene as defendants.

Having intervened on the basis of an alleged interest in selected sections, however, intervenors quickly assumed command of the entire case, and defense of the entire statute. They quickly "adopted the posture of 'fully participating parties . . . argu[ing] every issue with vigor equal to, or greater than the efforts of the state defendants.'" Charles III, 846 F.2d at 1064, App. at 14a, quoting District Court Mem. Op., Apr. 22, 1985 at 3. Indeed,

"[t]hroughout these proceedings both in the district court and on appeal to [the Seventh Circuit], the state defendants time and again adopted as their own briefs, motions, and other opposing papers filed by the intervenors. . .." Charles III, 846 F.2d at 1064, App. at 14a.[1] Further, with the approval of the

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[1] Intervening defendants led the defense at each of several critical phases of the litigation, spearheading the preparation of dispositive motions and the appeals from significant rulings on the merits. For example, each of the following of intervening defendants' briefs were adopted by some or all of the governmental defendants: (1) Motion to strike; (2) Motion and Brief in Support of Summary Judgment finding statute constitutional; (3) Brief in Response to the Supreme Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); (4) Brief urging en banc consideration of Seventh Circuit decision affirming preliminary injunction, Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (Charles I); and, (5) Brief in second appeal to Seventh Circuit urging reversal of permanent injunction.

governmental defendants, who neither filed their own briefs nor argued orally, intervenors presented the joint defense position in the second appeal to the Seventh Circuit. Charles v. Daley, 749 F.2d 452 (7th Cir. 1984)("Charles II").

Intervenors' dominant role in this litigation became fully apparent when, as the "alter ego" of the governmental defendants, intervenors, alone, appealed the Charles II decision to this Court. See Charles III, 846 F.2d at 1065; App. at 14a. The governmental defendants did not join the appeal, even though the Illinois Attorney General advised this Court that his "interest in [the Supreme Court] proceeding is . . . essentially coterminous with the position on the

issues set forth by the appellants." (Letter of Michael J. Hayes, Director of Advocacy for the Attorney General of Illinois, to the Clerk of the Supreme Court, July 15, 1985.) Although this Court ultimately dismissed the appeal, after full briefing and argument, for lack of standing, Diamond v. Charles, 476 U.S. 54 (1986); intervenors' appeal nonetheless required plaintiffs and their counsel to continue their advocacy on the merits of this litigation for another two years.

B. Both Lower Courts Ruled That Fees Are Appropriately Assessed Against Intervenors Who Attempt To Frustrate Plaintiffs' Vindication of Constitutional Rights

Although intervenors do not so clearly state, two separate awards of

fees -- one for the district and appellate courts litigation and one for the Supreme Court litigation -- are involved here. The district court judge, who has presided over the litigants for more than nine years, ruled that plaintiffs were eligible for fees as prevailing parties under § 1988. In a reasoned exercise of discretion, the district court reviewed the trial and appellate proceedings where both governmental defendants and intervening defendants had participated, and assessed the governmental defendants with responsibility for one-half of the lower courts' fees. The district court then assessed intervenors, who had led the defense efforts, with responsibility for the remaining one-half of the fees. See Mem. Op., Apr. 22, 1985; App. 75a-80a;

App. at 6a. See also Charles III, 846 F.2d at 1061; App. at 6a. Finding that intervening defendants had been full participants, the district court ruled that it would have been inappropriate to impose upon the governmental defendants liability for the full fee award. Mem. Op., Apr. 22, 1985; App. at 78a.

Intervenors were liable for fees, the district court held, because "[o]nce the intervenors chose to enter the suit in a position equal to that of the State defendants, they placed themselves in a position which permitted them to prevent the plaintiffs from gaining the relief they sought." Mem. Op., Apr. 22, 1985; App. at 76a-77a. Where an intervenor plays such a role, the district court found, "it would be unfair to permit that party to walk away from the plaintiffs'

fees and costs award." Mem. Op., Apr. 22, 1985; App. at 78a. See also Diamond, 476 U.S. at 70, noting that "[a]ny liability for fees is, of course, a consequence of Diamond's decision to intervene . . . ." [2]

In a subsequent order, the district court also granted plaintiffs' supplemental petition for fees arising out of the Supreme Court litigation. This judgment was assessed only against intervenors Diamond and Williams, the sole appellants before the Supreme

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[2] While recounting the fee litigation that had already occurred, this Court observed that "'the State defendants and the intervenors played at least equal roles in defending the abortion statute.'" Diamond, 476 U. S. at 70 n.22, quoting Charles v. Daley, No. 79 C 4541, Mem. Op., Apr. 22, 1985.

Court.[3]

Intervening defendants, who had previously appealed from the first assessment, then appealed from the second one.

The court of appeals, in a consolidated review of both fee awards, ruled that plaintiffs were prevailing parties and thus eligible for fees under § 1988. Finding that the district court

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[3] Each of the three intervening defendants had been held jointly and severally liable for the fees incurred during the district court and court of appeals phases of this litigation. Although Williams died during the pendency of intervenors' Supreme Court appeal, his estate neither substituted anyone for him nor formally withdrew from the litigation. Charles III, 846 F.2d at 1060 n.2; App. at 5a n.2. Accordingly, Diamond and Williams were held jointly and severally liable for the Supreme Court fees incurred by plaintiffs. Only Diamond appears to be pursuing this petition for certiorari. (See Petition for Certiorari at 1.)

had properly exercised its discretion, the court of appeals affirmed the first award in its entirety, 846 F.2d at 1070; App. at 26a, and affirmed the second award with minor modifications. 846 F.2d at 1077; App. at 41a. Recognizing the barriers intervenors had erected to the vindication of plaintiffs' constitutional rights, the court of appeals found that an award of attorney's fees against these intervening defendants was appropriate under § 1988 and was not otherwise barred by Supreme Court Rule 50 or the First Amendment. 846 F.2d at 1070-75; App. at 26a-36a.

REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS IS IN AGREEMENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS WHICH ASSIGN THE ASSESSMENT OF FEES TO THE DISTRICT COURT'S DISCRETION.

A. Allowing Attorney's Fees Comports With Congress' Purpose In Enacting Section 1988 And Is In Harmony With Decisions Of This Court Directing That Prevailing Parties Be Awarded Fees.

Congress enacted the Civil Rights Attorney's Fee Awards Actof 1976 in response to this Court's decision in Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975). See discussion at H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 2-3, reprinted in Civil Rights Attorney's Fee Awards Act of 1976 Source Book: Legislative History, Text, and Other

Documents (hereafter "Source Book") at 210-11. In Alyeska, this Court reversed an award of attorney's fees to a prevailing plaintiff in a civil rights case, ruling that the district court erroneously shifted fee liability without express statutory authorization. 421 U.S. at 269.

Congress promptly provided the requisite authority through enactment of § 1988 the following year.[4] The Alyeska decision had had a "devastating impact"

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[4] Section 1988, 42 U.S.C. § 1988 (1982), provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

on civil rights plaintiffs because private lawyers were refusing to take certain types of civil rights cases and "the civil rights bar, already short of resources, could not afford to do so." H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) at 2-3, reprinted in Source Book at 210-11. See also House Debates, reprinted in Source Book at p. 263. A variety of witnesses representing a broad spectrum of the legal profession, including the Justice Department, the Civil Rights Commission, the American Bar Association and civil rights groups such as the NAACP and the Lawyers Committee for Civil Rights Under The Law, testified that "because of the limited resources available . . . in public interest cases," S 1988 was needed to ensure private enforcement of civil and

constitutional rights. See Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & Administration of Justice, House of Representatives, 94th Cong., 1st Sess. 136 (1975)(statement of John Ferren).

Acknowledging this legislative history, which left no doubt that Congress intended that prevailing civil rights plaintiffs be compensated for their attorney's fees, the Seventh Circuit then reviewed the appropriate standard for assessing those fees. Prior decisions of this Court make clear that the key to fulfilling the congressional directive is to evaluate whether a civil rights plaintiff is a "prevailing party" under § 1988. Under the holding set down in Hensley v. Eckerhart, 461 U.S. 424 (1983), a plaintiff is considered a

prevailing party if he or she has succeeded on any significant issue which achieves some of the benefit plaintiff sought in bringing the suit. Id. at 433. Plaintiffs here met this formulation of prevailing parties eligible for fees.

1. Plaintiffs prevailed completely in this suit, including against intervening defendants.

At the conclusion of the litigation involving plaintiffs' challenge to the Illinois Abortion Law, 26 separate provisions -- nearly every operative section of the law -- had been declared unconstitutional and permanently enjoined. Charles III, 846 F.2d at 1060; App. at 4a-5a. Although intervening defendants conceded that plaintiffs had prevailed against the governmental defendants, Charles III, 846 F.2d at 1064, App. at 13a, they refused to

acknowledge that plaintiffs also had prevailed against intervenors. Rejecting intervenors' restrictive characterization of plaintiffs' victories, the court of appeals found it significant that intervenors voluntarily, and in the face of plaintiffs' opposition, had joined with and led the state defendants in "adamantly defending" the Abortion Law. Charles III, 846 F.2d at 1064; App. at 14a. Thus, when the defense position, almost always crafted by intervenors, on the constitutionality of the Abortion Law was rejected, intervenors as well were dealt a legal set-back. Charles III, 846 F.2d at 1060; App. at 5a.

Moreover, the Seventh Circuit considered it "particularly relevant that the plaintiffs have prevailed against the

intervenors with respect to each and every section of the abortion statute in which the intervenors claimed to have had interests separate and distinct from those asserted by the state defendants." 846 F.2d at 1065; App. at 14a-15a. Indeed, plaintiffs won more than a "moral victor[y]" against intervening defendants. Contrast Hewitt v. Helms, __ U.S.__, 107 S.Ct. 2672 (1987). As a result of the lower court decisions, the very provisions of the law in which intervening defendants claimed a separate cognizable interest were struck down, including: § 3.3 (parental notice), § 3.4 (spousal consultation), and, later, § 2(10) and § 11(d) (product descriptions), and § 6 (physicians to use method of abortion likely to benefit fetus and result in live birth).

Plaintiffs prevailed against intervening defendants no less definitively in the Supreme Court. By demonstrating that intervening defendants lacked standing, plaintiffs "succeeded in preserving their substantial victories over the numerous sections of the abortion law struck down by [the Seventh Circuit] and the district court." Charles III, 846 F.2d at 1073 n.26; App. at 32a, n.26. See also Williams v. Alioto, 625 F.2d 845, 847-48 (9th Cir. 1980)(Kennedy, J.), cert. denied, 450 U.S. 1012 (1981)(fees awarded plaintiffs as prevailing party even though appellate court had not ruled on merits of appeal but rather had declared defendants' appeal moot).

Assessing fees against intervenors was particularly appropriate, given the fact that intervening defendants had joined with the governmental defendants in defense of a statute that burdened plaintiffs' exercise of fundamental rights.[5] "[O]nce the intervenors chose to enter the suit and become parties,

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[5] Contrary to intervening defendants' claim that a necessary condition precedent to the assessment of fees is an adjudicated holding that the defendants violated plaintiffs' civil rights, (cert. petition at 8), neither § 1988 nor the case law supports such a standard. Fees are awarded to plaintiffs who prevail on even a "wholly statutory, non-civil-rights claim" so long as the case includes a non-frivolous constitutional claim that was not ruled upon, see Maher v. Gagne, 448 U.S. 122, 132 (1980), as well as to plaintiffs who prevail by showing that a law which has not yet gone into effect, and thus has not yet violated their rights, is unconstitutional. See, e.g., In re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610, 612-13 (10th Cir. 1984).

they placed themselves in a position to bar plaintiffs from gaining the relief they sought." Mem. Op., March 6, 1986; App. at 65a.[6]

2. Intervenors' claim that plaintiffs failed to prevail against them is without support in law or fact.

The Supreme Court decisions with which intervening defendants claim the fee assessments are "in direct conflict" did not involve the issue of intervenor liability for fees. The Seventh Circuit concluded that, by citing these cases, intervening defendants attempted to

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[6] The district court also found that intervenors' litigation conduct often amounted to "recalcitrance" and precipitated "unneeded expenditure of time." Mem. Op., Apr. 22, 1985; App. at 78a. Intervenors further prolonged the litigation by taking an unsuccessful appeal to the Supreme Court. Contrary to the initial representations intervenors made to this Court, the governmental defendants did not join in the appeal.

stretch this authority "to answer a question the case[s] simply did not raise." 846 F.2d at 1068; App. at 21a.

Intervening defendants' primary authority, Kentucky v. Graham, 473 U.S. 159 (1985), raised the issue of whether § 1988 "allows attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacity and prevails." 473 U.S. at 161. In the narrow context of personal versus official capacity suits, this Court in Graham held that when Eleventh Amendment immunity bars an official capacity suit on the merits against the state official, the scope of that immunity extends to bar the assessment of attorney's fees against the state, even if the plaintiff has prevailed against a governmental employee

in his personal capacity.

Graham clarified the scope of a state's Eleventh Amendment immunity, an immunity to which intervening defendants can lay no legitimate claim. Intervening defendants' oft-quoted language from Graham, that "liability on the merits and responsibility for fees go hand in hand" (cert. petition at 8), refers to the losing personal-capacity defendant in Graham, the sole party from whom the plaintiffs there could have recovered fees given the Commonwealth of Kentucky's constitutional immunity from such fees. Thus, as found by the court of appeals, "[t]he language relied upon by the intervenors is . . . specific to the facts of Graham and is not fairly interpreted as a definitive statement on section 1988 liability in factually

distinguishable cases." 846 F.2d at 1067 n.13; App. at 19a, n.13.[7]

Equally unavailing is intervening defendants' reliance upon Hanrahan v. Hampton, 446 U.S. 754 (1980), and Hewitt v. Helms, __ U.S. __, 107 S. Ct. 2672 (1987). In Hanrahan, fees were not appropriate because plaintiffs had succeeded only in reversing an order of summary judgment in favor of defendants; plaintiffs had not secured a judgment on the merits in their favor. Hanrahan, 446 U. S. at 758-59. Similarly, in Hewitt, plaintiff never obtained a judgment granting him affirmative relief on the merits of his claim. In Hewitt, this

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[7] Intervenors' reliance upon of Glover v. Alabama Dep't of Corrections, 776 F.2d 964 (11th Cir. 1985), suffers from the same limitation. Glover, like Graham, involved an issue of a state's Eleventh Amendment immunity.

Court thus ruled that a party has not prevailed and cannot receive fees if he litigates to judgment and loses on all of his claims. __ U. S. at __; 107 S.Ct. at 2674.

Obviously, the denial of fees in Hanrahan and Hewitt, based upon plaintiffs' failure to obtain any relief, is "far removed from the facts of this case." Charles III, 846 F.2d at 1065 n.11; App. at 16a, n.11. Here plaintiffs succeeded in getting almost every section of the challenged law declared unconstitutional, and as previously noted, prevailed against intervenors on the very sections in which they claimed a legally cognizable interest. Charles III, 846 F.2d at 1065; App. at 14a-15a.

B. The Seventh Circuit's Rejection Of An Absolute, Per Se Rule Prohibiting Assessments Of Attorney's Fees Against Intervenors Does Not Conflict With Decisions Of Other Federal Courts.

Not a single federal circuit has interpreted § 1988, or analogous civil rights fee-shifting statutes,[8] as imposing the per se bar intervenors urge here to the assessment of attorney's fees against intervenors who voluntarily join the litigation and zealously participate as the lead defendants in concert with the losing governmental defendants. As case law from the other circuits makes apparent, the Seventh Circuit

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8 This Court has directed federal trial courts to consult related attorneys' fee statutes and case law when awarding fees to prevailing civil rights plaintiffs. See, e.g., Hensley, 461 U.S. at 433 n.7; New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

appropriately affirmed the apportionment of fee liability among the defendants, including intervening defendants. Any other decision, given the circumstances of this case, would frustrate Congress' purpose in enacting § 1988.

Intervening defendants here conceived of and implemented the strategy for all defendants. If intervenors are afforded immunity from fee liability, governmental defendants could abdicate defense of civil rights suits to such intervenors. Any recovery of fees to those plaintiffs who prevail would thus be avoided and access to the courts would be denied to many litigants who Congress intended to function as private attorneys general in the enforcement of the

country's civil rights laws.[9]

Even if government did not abandon the litigation entirely, denying plaintiffs fees for their successful work against intervening defendants would make it even more difficult for civil rights plaintiffs to retain competent counsel. Plaintiffs not only would have to find counsel willing to work on the contingency of future fees under § 1988, but plaintiffs also would have to find counsel willing to spend substantial additional time litigating against

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[9] Describing pre-Alyeska cases which approved fees under standards that Congress intended to be used when fees were assessed under § 1988, the legislative history approvingly cites Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd mem., 409 U.S. 942 (1972). In Sims, fees had been assessed against intervening defendants, members of the Alabama State Legislature, who presumably would have been immune from suit and thus fees, had they not intervened.

intervenors, time which would never be compensated for, given intervenors' argument here. A better strategy for frustrating Congress' interest in enacting § 1988 could scarcely be imagined.

Moreover, further review of the fee awards here would serve no useful supervisory purpose, absent an abuse of discretion which intervenors cannot demonstrate. Intervenors already have received appellate review from the Seventh Circuit and sought, unsuccessfully, to get an en banc rehearing. On three separate occasions intervenors asked the district court to reconsider its assessment of fees. To provide intervenors with yet another opportunity to attack the district court's reasoned exercise of discretion

court's reasoned exercise of discretion would "serve only as an invitation to [other] losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees . . .." Hensley, 461 U.S. at 442 (Brennan, J., concurring in part, dissenting in part).

The Seventh Circuit approved here, as § 1988 directs, the discretion of the district court in assessing fees against intervening defendants. In reaching this decision, the Seventh Circuit relied explicitly upon authority from both the Court of Appeals for the D.C. Circuit and the Court of Appeals for the Sixth Circuit. It thus reached a result that is in conformity with those decisions and decisions reached by other federal

courts.

1. The D.C. Circuit.

In Moten v. Bricklayers, Masons, & Plasterers Int'l Union, 543 F.2d 224, 239-240 (D.C.Cir. 1976), the court of appeals affirmed the district court's decision to award attorney's fees to the prevailing plaintiff under Title VII and to assess responsibility for a portion of the fees against the intervening-defendant union. In Moten, the defendant intervenor objected to and litigated against the settlement agreement and its hiring provisions for those class members who had experienced discrimination. See also Thompson v. Sawyer, 586 F. Supp. 635, 639 (D.D.C. 1984)(plaintiff entitled to fees from union which tried, unsuccessfully, to intervene in employment discrimination

action under Title VII, because by "seeking intervention and modification of the District Court's relief orders, the [union] 'erected substantial obstacles that the plaintiffs had to overcome' in resisting the defendant's discriminatory treatment and attaining the desired and court-ordered relief (citation omitted).[10]

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[10] Of course, as can reasonably be expected, when made a matter of their sound discretion, trial courts have declined to assess fees against intervening defendants when special circumstances made such an assessment unjust. For example, when intervening defendants' role in the litigation was that of raising independent constitutional interests, i.e., playing the role of functional plaintiff, fees have not been assessed. See, e.g., Grano v. Barry, 783 F.2d 1104, 1112 (D.C.Cir. 1986) (district court recognized that it had the authority to assess fees against intervenors but deemed it inappropriate to do so under the circumstances). Compare Sierra Club v. EPA, 769 F.2d 796, 810 (D.C. 1985)(fees not available against intervenors under Clean Air Act

2. The Second and Third Circuits.

Contrary to the suggestion made by intervening defendants (cert. petition at 12), the Second Circuit has not addressed the issue of whether intervening defendants can be held liable for attorney's fees under § 1988. The case cited by intervening defendants, Annunziato v. The Gan, Inc., 744 F.2d 244 (2d Cir. 1984), did not involve the question of intervening defendants' fee liability, but that of a named defendant. Further, that decision rested on the

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because intervening defendants, like plaintiffs, had litigated "to encourage the effective interpretation and implementation of the Act").

Intervening defendants here are not functional plaintiffs and, in any event, have waived such a claim by failing to raise it in the courts below. Charles III, 846 F.2d at 1059 n.1; App. at 2a n.1.

district court's reasoned discretion, affirmed by the Second Circuit, that fees should not be assessed against one of the named defendants, The Gan.

The Seventh Circuit rejected intervenors' argument that Annunziato absolved them from fee liability, noting that The Gan had been "an innocent third party caught in the cross-fire between plaintiffs and the [governmental defendant]." See Charles III, 846 F.2d at 1065 n.11; App. at 15a-16a n.11. Intervening defendants here, who were vigorous opponents at every stage of the proceedings, cannot compare themselves to The Gan, which consistently had sought to extricate itself from the litigation.

In Vulcan Society of Westchester City v. Fire Dep't, 533 F. Supp. 1054 (S.D.N.Y. 1982), a district court within

the Second Circuit held that an assessment of attorney's fees against the intervening-defendant union was appropriate. The intervenor in Vulcan, like intervenors here, "litigated vigorously in an attempt to deny plaintiffs various aspects of the relief that plaintiffs sought . . .." Vulcan, 533 F.Supp. at 1062. Compare Kirkland v. New York State Dep't of Correctional Services, 524 F. Supp. 1214 (S.D.N.Y. 1981)(district court properly exercised its discretion in declining to assess fees against intervening defendants because a major portion of intervening defendants' constitutional arguments had been accepted by the Court of Appeals for the Second Circuit).

Like the Second Circuit, the Third Circuit has not yet been presented with

an opportunity to review the assessment of attorney's fees against an intervening defendant. However, in May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984), aff'd in part, fee appeal dism'd, 780 F.2d 240 (3d Cir. 1985), the district court assessed attorney's fees against intervening defendants who were members of the New Jersey Legislature and who had intervened to defend the Minute of Silence Statute. Although the legislators would have been immune from suit, they waived their immunity, intervened and took a leadership role in defending the statute. The district court assessed fees against the intervening legislators finding that, having intervened, the legislators stood "in the same position as any other defendant who has defended an unconstitutional statute." May, 578 F.2d

unconstitutional statute." May, 578 F.2d at 1317. See also Daggett v. Kimmelman, 617 F. Supp. 1269 (D.N.J. 1985), aff'd in part, rev'd in part, 811 F.2d 793 (3d Cir. 1987)(relies on May to hold legislator intervenors who defended unconstitutional reapportionment plan liable for fees).

3. The Sixth Circuit.

Intervening defendants completely misunderstand the law in the Sixth Circuit with their claim that there is a split on the question of intervening defendants' liability for attorney's fees. Although intervenors did not cite Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979), the Sixth Circuit in that case approved the assessment of fees against an intervening defendant. In Haycraft, the court of appeals affirmed

the district court's assessment of fees under the Emergency School Aid Act, 20 U.S.C. § 1617, against an intervening defendant who opposed plaintiffs' desegregation plan and who proposed one of his own. Concerned that the alternative plan proposed by intervenor "imposed a substantial barrier to the realization of the full constitutional rights of [plaintiffs]," the Sixth Circuit rejected the argument that fees could be assessed only against a governmental entity which had been found to have violated plaintiffs' rights. Haycraft, 606 F.2d at 132. As an independent basis for its decision, the Sixth Circuit also found that that intervenor had litigated in bad faith, 606 F.2d at 133, conduct with which intervenors in the instant case have been

charged as well. See Plaintiffs Br. in consolidated appeal Nos. 86-1552, 86-3137, at pp. 30-34. See also Mem. Op., Apr. 22, 1985; App. at 78a (although court did not reach issue of bad faith, it observed that intervenors did exhibit "recalcitrance" and precipitated "unneeded expenditure of time").

District courts within the Sixth Circuit have exercised their discretion, as Haycraft directs, and have assessed fees against intervening defendants when appropriate under the circumstances of the case. See Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268 (N.D. Ohio 1984)(fees assessed against intervenors); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981)(fees assessed against proposed intervenors). Compare Wolfe v. Stumbo,

No. C-80-0285 (W.D. Ky. 1983) (fees not assessed against intervenors because, unlike Haycraft, their involvement did not amount to "obstinacy" in resisting plaintiffs' realization of their constitutional rights) and Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. 1981)(same).

4. The Seventh Circuit.

In this case and in Zipes v. Trans World Airlines, 846 F.2d 434 (7th Cir. 1988), petition for cert. filed, No. 88-608, the Seventh Circuit ruled that it is within the discretion of a trial court to award fees against an intervening defendant. In Zipes, an employment discrimination case under Title VII, the intervening defendants erected a substantial roadblock to plaintiffs' vindication of their rights. See Zipes,

846 F.2d at 436-37.

5. The Eleventh Circuit.

In Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986), cert. denied, 479 U.S. 1033, (1987), the court of appeals held that the lower court had erred in denying plaintiffs attorney's fees against intervenors who claimed that their own constitutional rights were violated by the challenged settlement. Characterizing the intervenors as functional plaintiffs, the Eleventh Circuit ruled that fact was a circumstance that should be evaluated when awarding fees. Reeves, 791 F.2d at 1484. Even with that factor considered, however, the court of appeals held that intervenors were liable for fees. 791 F.2d at 1485.

II. INTERVENING DEFENDANTS FAIL TO PRESENT A SUBSTANTIAL ISSUE WITH THEIR CLAIM THAT SECTION 1988 REQUIRES AN AWARD OF SUPREME COURT COSTS BEFORE FEES ARE ASSESSED.

Intervening defendants cite no relevant authority to support their argument that fees were inappropriately assessed against them because plaintiffs were not awarded costs under Supreme Court Rule 50, for the Diamond v. Charles appeal.[11] The absence of an award of costs under Rule 50 is not dispositive of intervenors' liability for Supreme Court fees. As the court of appeals noted, Supreme Court Rule 50 specifically allows

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[11] Intervening defendants once again do not distinguish between the two separate fee awards. Their reliance on this argument to escape fee liability would apply, if at all, to the fees awarded plaintiffs for work before this Court.

costs when a party secures an affirmance or a reversal of the lower court's decision but does not contemplate situations, like the present one, in which plaintiffs protect their victory by succeeding in having the Supreme Court appeal dismissed on jurisdictional grounds. Charles III, 846 F.2d at 1071; App. at 28a. Consistent with the decision below, other lower federal courts have not required an assessment of costs as an absolute prerequisite to the assessment of fees. See, e.g., Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir. 1985)(en banc), cert. denied, 474 U.S. 1083 (1986); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981); Willie M. v. Hunt, 564 F. Supp. 363 (W.D.N.C. 1983), aff'd in part, rev'd in part, 732 F.2d 383 (4th Cir. 1984). See

also Ekanem v. Health & Hospital Corp., 778 F.2d 1254, 1257 (7th Cir. 1985).

Marek v. Chesny, 473 U.S. 1 (1985), does not as intervenors themselves concede (cert. petition at 14), hold that an award of Supreme Court costs is a necessary prerequisite for an award of fees. Marek thus fails to provide any instruction at all on the question of whether fees are appropriate for the Supreme Court segment of this litigation. In Marek, fees were held to be inappropriate because plaintiffs had not prevailed in excess of the Rule 68 offer of judgment that had been made. See Marek, 473 U.S. at 11 ("where a rejected settlement offer exceeds the ultimate recovery, the plaintiff -- although technically the prevailing party -- has not received any monetary benefits from

the postoffer services of his attorney").

Plaintiffs here, in contrast to the plaintiff in Marek, unquestionably prevailed at all levels of the litigation, including the prior appeal to this Court. By securing the dismissal of intervening defendants' appeal, Diamond, 476 U.S. 54, plaintiffs preserved the rulings of the lower federal courts that the Illinois Abortion law was unconstitutional and should be permanently enjoined. Charles III, 846 F.2d at 1060; App. at 5a. Plaintiffs thus succeeded on a "significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit," Hensley v. Eckerhart, 461 U.S. at 433 (citation omitted), and must be considered parties entitled to fees.

Intervenors once again fail to

identify a substantial issue in need of resolution by this Court. Moreover, to deny plaintiffs fees for the Supreme Court litigation on the basis that no costs were assessed under Rule 50, would, as the court of appeals observed, "stand as a formidable impediment to the full achievement of the important objectives section 1988 was conceived and enacted to further." Charles III, 846 F.2d at 1073; App. at 32a.

III. THE AWARDS OF ATTORNEY'S FEES TO THE PREVAILING PLAINTIFFS DO NOT BURDEN THE RIGHT OF INTERVENING DEFENDANTS TO ENGAGE IN COLLECTIVE ACTIVITY TO OBTAIN ACCESS TO THE COURTS.

Intervening defendants' assertion that the First Amendment right of access to the courts immunizes them from any liability for attorney's fees finds no finds no support in the decisions of this

Court or the lower federal courts. In making this argument, intervenors fail to acknowledge their waiver of much of this claim and, further fail to distinguish between the right of access and an alleged right to be free of all costs resulting from that access.

Intervening defendants waived any First Amendment argument they might have made with respect to fees incurred litigating before the district court and the Seventh Circuit. Charles III, 846 F.2d at 1074 n.28; App. at 34a n.28. Intervenors waived this claim because it was "only after nearly seven years of defending the Illinois Abortion Law and two years of fee litigation" that, for the first time, and in relation to the Supreme Court fees, the intervening defendants argued that "the assessment of

fees here would violate their First Amendment rights to fully participate in this litigation." Mem. Op., Dec. 5, 1986; App. at 50a-51a.

The First Amendment right protected by this Court's decisions in NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978), is that of "collective activity undertaken to obtain meaningful access to the courts." Primus, 436 U.S. at 426. Neither case suggests that such access to a judicial forum "is entitled to be conducted free from both the inherent and statutorily imposed financial consequences of such [litigation] activity." Charles III, 846 F.2d at 1075; App. at 36a.

Obviously, intervening defendants -- who litigated as parties at every stage of this litigation -- enjoyed access to

this Court, the court of appeals and the district court. Thus, the court of appeals correctly concluded that this lawsuit, unlike Button or Primus, "does not involve rules and regulations governing attorney conduct which place specific and admittedly severe restrictions on the ability of counsel to locate and recruit potential litigants." Charles III, 846 F.2d at 1074; App. at 35a.[12]

It also is significant that

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[12] Intervening defendants selectively edit this same quote to suggest that the court below concluded that § 1988 imposed a restriction on intervenors' rights of association and expression. (Cert. petition at 16.) The court of appeals, however, reached the contrary conclusion, finding that intervenors' claim was "far fetched indeed." Charles III, 876 F.2d at 1074; App. at 35a.

intervening defendants eschewed the opportunity to express their views by participating as amicus curiae -- a form of pure expression and a route of access to the courts which poses no risk of financial liability. Defendants categorically rejected this alternative in favor of joining this § 1983 litigation as defendants. As fully participatory party-defendants, intervenors enjoyed the authority to make, and implement, strategic decisions which directed the course of the litigation. By choosing to participate as full defendants, with all of the advantages that entails, intervening defendants voluntarily assumed the risk which all losing civil rights defendants in § 1983 litigation face: the possibility that fees will be assessed

against them pursuant to § 1988.

This Court previously has held that, while the First Amendment protects access to the federal courts, it does not immunize a party from all financial costs that accrue as a consequence of its litigation activity. In Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), this Court held that the First Amendment right of access to the courts prevented the NLRB from enjoining, as an unfair labor practice, a state court lawsuit prosecuted by an employer against an employee. Id. at 746-47. However, this Court further ruled that if the judgment went against the employer in the state court or if the suit was shown to be meritless, the NLRB may consider whether the employer should be required to reimburse the employees for their

attorney's fees and other expenses. Id. at 747. Accord California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)(although First Amendment protects the rights of party to oppose, in court, applications by a competitor for operating rights, First Amendment does not provide antitrust immunity should party's activity in the courts be found to be anticompetitive). Compare Associated Press v. United States, 326 U.S. 1 (1945) (First Amendment does not provide newspaper cooperative with immunity from antitrust laws nor does it require that antitrust laws be applied under less stringent standard to parties who have formed a "combination" with the purpose of asserting their interests in free press and expression).

Lower federal courts have rejected

the argument, similar to that made here, that a fee award against private parties assessed as a consequence of their litigation conduct unconstitutionally burdens their right of expression. See, e.g, Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268 (N.D. Ohio 1984)(fees assessed against intervening defendants who defended unconstitutional abortion law); and, Decker v. U.S. Dep't of Labor, 564 F. Supp. 1273 (E.D. Wisc. 1983)(fees assessed against intervenors for increasing legal efforts plaintiffs needed to prevail in challenge to unconstitutional use of CETA funds). Accord Riddell v. National Democratic Party, 712 F.2d 165, rehearing denied, 718 F.2d 1096 (5th Cir. 1983)(fees assessed against private parties

asserting associational interests in the litigation). Similarly, the lower federal courts have not construed the First Amendment right of access to protect against litigation costs. See McNeil v. Lowrey, 831 F.2d 1368, 1373 (7th Cir. 1987), cert. denied, __ U. S. __, 108 S.Ct. 1236 (1988) (right of access does not include waiver of witness fees); Johnson v. Hubbard, 698 F.2d 286, 289 (6th Cir.), cert. denied, 464 U.S. 917 (1983)("witness fees clearly fall in category of items such as trial transcripts, depositions and other documents, which the Constitution does not require a court, or in practical terms, the federal government to pay at

request of indigent party").[13]

Intervening defendants' argument here seeks not access to the courts, but rather seeks immunity from the burdens suffered by others as a result of intervenors' conduct. No matter how broad the right of access, the First Amendment does not prohibit the shifting of fees from prevailing civil rights plaintiffs to intervening defendants who worked to defeat plaintiffs'

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[13] Intervening defendants previously have acknowledged that the First Amendment does not protect a right to participate in litigation at no cost whatsoever. In their first brief filed with the court of appeals, intervening defendants conceded "that they should assume the reasonable costs of taking part in this litigation, and do not contest the costs that have been assessed against them." (Int. Br. No. 86-1552 at 42 n.12.) Intervening defendants have never identified any constitutionally significant difference between court costs and attorney's fees that, under § 1988, are often assessed as a part of costs.

their own efforts, prolonged this litigation at substantial expense to plaintiffs. To accept intervening defendants' argument and to construe the First Amendment as requiring complete immunity from fee liability would convert this right of access to the courts into a potent weapon for those intervenors who seek to perpetuate constitutional wrongs at the expense of the prevailing plaintiffs who seek to remedy those wrongs under the authority of the nation's civil rights laws.

CONCLUSION

The court of appeals correctly applied settled precedent and affirmed the assessment of fees against intervening defendants. No conflict with the decisions of this court or with

decisions of the other circuit courts has been presented. Nor has any issue of constitutional or statutory construction been raised that is deserving of review by this Court. Therefore, respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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